United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1425

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ARON SCHATTEN,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

Appellant's Brief

ALFRED I. ROSNER
Attorney for Appellant
277 Broadway
New York, N.Y. 10007
(212) 962-3342

MARTIN B. ROSNER,
Of Counsel, on Brief

Dick Bailey Printers, Inc., Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CASES CITED and TEXTBOOK AUTHORS

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Appellee

vs.

ARON SCHATTEN,

Appellant

----------x

BRIEF FOR APPELLANT ARON SCHATTEN

PRELIMINARY STATEMENT

On November 4, 1975, appellant Aron Schatten was convicted on a One Count indictment (75 Cr. 739) after a 2 day jury trial (before Judge Wyatt), charging him with unlawful possession on July 17, 1974 of shirts stolen from a motor truck in interstate shipment. He remained on bail under a $10,000 personal recognizance bond, plus $1,000 cash which he posted.

On Friday, December 12, 1975, he was sentenced to a term of imprisonment of 3 years and ordered remanded, at the request of the Government.* Judge Wyatt, however, modified his order and permitted him to remain on bail until December 15, 1975. On that day (Judge Wyatt having gone on vacation), Judge Werker permitted Schatten to remain on bail until Friday, December 19th, at which time he surrendered to the marshal as ordered.

On December 19th, the Court of Appeals, by a majority vote, denied bail pending appeal (Judge Gurfein strongly dissenting). The appeal, however was ordered expedited on the original record, etc.

---

* Note: Promptly after sentence, on December 12, 1975, Judge Wyatt signed an order granting defendant's application to proceed in forma pauperis (Title 28, section 1915), thereby indicating that he is of the opinion that defendant's appeal has merit and is not frivolous.

POINT I

BECAUSE OF THE WEAKNESS OF THE GOVERNMENT'S CASE, AND CERTAINLY ON THE ENTIRE CASE, THE COURT SHOULD HAVE DIRECTED JUDGMENT OF ACQUITTAL ON THE AUTHORITY OF TAYLOR v. UNITED STATES, 464 F.2d 240 (2d Cir.,1972)

TESTIMONY OF GOVERNMENT WITNESSES

WILLIAM GREENSPUN, a truck driver for Associated Transport, on July 17, 1974, found his truck missing from East 27th Street (Manhattan) (17)* On his way home he saw his truck at Rutledge Street and Kent Avenue (Brooklyn) (19). There was nothing in the truck. (20)

Government's Exhibit 1, a shipping order for 35 cartons of shirts to Stein Stores, in Cleveland, Ohio, was received in evidence. (These shirts were the subject matter of the indictment)(75 Cr. 739).

Receipts for shipments other than for shirts which were on the truck were received in evidence as Exhibits 2-A, B and C. (23-24) .

Over objection that the merchandise other than for shirts are not the subject of the indictment and are therefor irrelevant, receipts for these other shipments that were on the truck were admitted in evidence (25-26). The court, however, instructed the jury (26):

> All right, they will be admitted, but the jury will understand that there is no charge here that involves these other shipments. The only shipment that is involved here is the 35 cartons consigned to Stein Stores in Cleveland. (26)

---

* Numerals refer to pages in the trial transcript..

Greenspun did not know the defendant Schattan and did not know who stole his truck that day. (27-29)

MAURICE KATZ, Secretary of Katone Corporation, over objection, testified that on July 17, 1974 he sent a shipment of three cartons of radios, about 36 radios, having an approximate value of $400 (30-32)

PETER FERRELLI, President of Michaelangelo Knitwear Corporation, on July 17, 1974,made a shipment of shirts via Associated Transport to Richmond Bros. and Stein Stores in Cleveland, Ohio (34-35). The price was $15-16,000 for 3200 shirts. (35)

He did not know nor did he ever meet nor did he ever have a conversation with the defendant Aron Schattan.

The 3200 shirts cost $4 each, plus duty. (42)

OCTAVIO ORTIZ has been employed by Arpen Trucking for about three years. Aron Schattan is his boss. Mr. John McMillan also drives for the company. (45) Ortiz never received more than $10 or $15 by check for freight for Arpen Trucking Company and never delivered any merchandise to the Star Sportswear Company on Orchard Street and never heard of Moses Goldberger. (45-46)

He has known Aron Schattan for 10-15 years and he has been a good boss to him, letting him make a living to the best of his ability. (46)

JOHN STUART McMILLAN has been employed by Arpen Trucking Company for about seven years as a truck driver. Ortiz is the other truck driver. The company is run by Aron Schatten. On delivery of goods McMillan may receive $10,$12, $30 at the most.(50) He never saw Exhibit 8 (Goldberger's Company's check for $2443 for the shirts.) (51)

The Arpen Trucking Company has three trucks. McMillan drives one, Ortiz drives one and Schatten drives one. McMillan never delivered 35 cartons of goods in 1974 to a store on Orchard Street, never picked up a check there or made any deliveries there. (51) As a boss Schatten is the best around . (51-52)

MOSES GOLDBERGER, owner of Star Sportswear Corporation, located at 155 Orchard Street, testified that in July, 1974, he purchased a large quantity of men's knit shirts. (54)

A man came in and showed him"some samples of the sweaters"" around $2 a piece for 2000 shirts or sweaters. (54)

He never saw this man before and never saw him again and does not think he could identify him again and he does not see him in court. (55)

The man wanted payment in cash. Goldberger said he paid only by check. It was agreed he would pay by check payable to Cash. (56)

A day or two later the shirts in a couple of cartons were brought by two white male men in a Yellow Ryder rental truck. (57-58). He paid $2400, "with change." (58) There were a few more than 1200 shirts because it was $2 a shirt. (58)

The check was dated August 1, 1975. (59)

Over objection, the court ruled Goldberger could testify to a conversation he had with the men who delivered the shirts. (61)

They "wanted cash again" and he told them he was going to pay by check, which was going to be made out as Cash. He didn't want to accept the merchandise because they were packed loose instead of in boxes and he didn't like them that way. He also told them that there were a lot of big sizes, extra-large sizes, which he couldn't use. They told him there was nothing they could do about it. They told him he would have to talk to the boss. They gave him a card and over objection, this card was received in evidence as Exhibit 9 (63) It read, Arpen Trucking Company, Incorporated, and the name of the individual, Aron Schatten. (63)

Goldberger sold the shirts to B.V. Imports on Broadway, in Manhattan, at $2.75, together with some other merchandise and was paid by check. (Exhibit 10) (64)

On January 16, 1975, in his attorney's office, he was shown "a couple of pictures." He picked out between two and four pictures that looked familiar to him as the people who brought the shirts. (67) Business cards he gets from salesmenand others he puts in his register or if its full he puts them on the side. (69-70) The card with Schatten's name he put with the other cards. He has about thirty cards now. If he looked at each one of them he would not remember what person gave him each card. (71)

The card the deliveryman gave him sometime in July, 1974, Goldberger gave to (FBI agent) Kosednar, in his lawyer's office, on January 16, 1975.

On the day of delivery of the shirts, he claims he phoned Schatten only once that same day but could not get through so he just put the card away. (73-74)

(Note: If Schatten was criminally involved and was endeavoring to avoid contact with a prospective purchaser and for that reason had some person other than himself sell the shirts to Goldberger; and was careful not to have his employees or one of his trucks make the delivery, but was stupid or foolish to give the deliverymen his card to give Goldberger in case any difficulty developed so that Goldberger could phone him, wouldn't he stay glued to his phone in case of a phone call from Goldberger? Goldberger claims, however, that he did call but could not get through. Furthermore, the matter allegedly having been straightened out, wouldn't the deliverymen have taken back the card since it was an incriminating piece of evidence that would lead to Schatten in case the shirts were traced to Goldberger? Wouldn't it seem,

therefore, that Goldberger got a different card from the deliverymen but that Goldberger was mistaken when he testified he got the Schatten card from them? It is more plausible to believe that Goldberger got the card from Schatten under the circumstances detailed in Schatten's testimony when he took the witness stand, in which version Schatten appears to be corroborated by Goldberger's somewhat hazy recollection. Goldberger's testimony on this point will shortly follow, keeping in mind that he was testing his memory in November 3, 1975 as to something which Schatten testified occurred in July, 1974.)

Before the grand jury on March 7, 1975, Goldberger testified he could not remember exactly if he paid the individual at the time he sold him the shirts, or whether he paid the drivers. And at the trial he admitted he did not then remember whether it was the salesman or whether it was the deliverymen whom he paid.(75)

By July 26 he had already been paid by B.V. for the shirts but his check for the shirts was dated August 1, 1974.

Asked whether he remembered anyone calling him or coming to the store and asking whether the check that he made out for August the 1st to Cash was a good check, he answered, "It's possible that somebody called me at that time." He was then asked,

Q. On the phone or did they come to the store?

A. I don't remember exactly because this is something I didn't record it in my head but something lays in my memory. (76)

It is his practice when he buys goods to give post-dated checks two or three weeks ahead of time. He's done it dozens of times and still does it now. (76-77)

It's possible he said someone came around or called him on the phone about whether or not the check is good (77) He said, he can't remember exactly because lots of times he gives a guy a check and he (the guy) gives it to another guy and then he (Goldberger) gets a call if the check is okay to deposit because he (the guy) didn't want it to go through the bank and for the bank to return it. (79)

He cannot say positively that the deliverymen gave him this card (the Schatten card). (79-80) He was then asked (80)

Q. Could it be that the person who came out to find whether or not the check was good gave you that card?

A. I don't know.

And he could not say 100% that the card has to do with these shirts. (80)

(Since the Government depended so much on Goldberger's hearsay testimony in which he said that the deliverymen gave him Schatten's business card, this answer as well as his foregoing testimony would appear to destroy the Government's extremely weak or non-existent case against Schatten.)

The deliverymen spoke mostly with an Italian accent.(81)

The shirts came in big cartons, seven, nine.(81) They filled up his whole store, a customer could not walk in or couldn't walk out. He was excited. That is when he thinks the deliverymen gave him the card. (81) He is almost 100% sure he gave the check to the deliverymen. (83)

Then, on redirect, he again stated that he was not positive that he received the card from the deliverymen. (83)

Goldberger then answered, "Yes," in response to the prosecutor's leading question:

> Q. It is the best of your recollection that that card, Government's Exhibit 8, was given to you by th deliverymen, is that correct? (86)

Since Goldberger got the merchandise well in advance of August 1st, he was in fact getting the merchandise on credit. So what really bothered him was the fact that the seven or eight cartons were taking up the room in his store. (85-86)

ISAAC MOUCATEL has been with the Mercedes Book Distributors for twenty years and is its Manager. The Company has been using Arpen Trucking Company to make its deliveries and he has known Schatten for about twelve-fifteen years as a business associate and as a friend. (87-88); and sees him three or four times a week. (89) On July 25th Schatten asked him to cash the Goldberger check and he did. Moucatel deposited the check on August 1st. (90) He cashed checks for Schatten at other times. (92)

On July 25th he gave Schatten $1000 in cash and $1000 by check. (105-107) So in a sense he was advancing Schatten money against the post-dated check. (105) A few days later he gave him the balance, to wit, $443. (93,108,110) He loaned Schatten money on occasions before and Schatten loaned him money. He never had difficulty being repaid by Schatten. (108-109) Subsequently to July 25th he loaned Schatten money and been repaid. He socializes with Mr. and Mrs. Schatten weekends. (109-110) Moucatel was contacted by FBI agent Kosednar and Schatten assured Moucatel that the check was a good one and to tell Kosednar that Schatten negotiated the check with him. Moucatel so informed Kosednar. Schatten told Moucatel that he got the check for $2443 for the sale of wife's ring. (111-113) Moucatel knew Mrs. Schatten had jewelry and had seen her wear jewelry. (116) The cashing on July 25th,

1974 of the August 1, 1974 post-dated Goldberger check was a short term loan to Schatten who was his friend. (106,118-119)

RONALD W. KOSEDNAR, special agent with the FBI, testified he had a search warrant for B.V. Imports, 560 Broadway, and on September 23, 1974 recovered 1400 Michaelangelo knit shirts. (123-124)

On September 16, 1975, he showed Goldberger seven photographs. Over objection (127) he testified that Goldberger selected two of them as the person who sold him the shirts. One of them was of the defendantSchatten (126-127) What Goldberger allegedly said was that "two of those men looked familiar." "He didn't say he recognized them from the store." (129)

In a lineup in which Schatten was present (129), he selected three individuals out of the lineup but wasn't sure. After he selected the three individuals, he selected two and of the last two Mr. Schatten wasn't one of them. (129-130) Schatten may have been one of the three individuals who were originally selected, but then eliminated by Goldberger when he finally selected only two of the individuals. (129-130,137) *

Arpen Trucking Company is located at 19 Lorimer Street where the garage of Arpen Trucking Company is located. It is approximately one-half mile or six blocks from Kent and Rutledge Streets where the stolen truck was recovered. (128)

As a conceded expert (130-131), the agent testified that it is unusual for persons engaged in the theft of trucks for them to leave those stolen trucks near their places of business or where they drop off stolen merchandise. (131)

He also testified that it is unusual for persons who sell stolen merchandise to accept checks for the payment thereof. (131)

The police found no fingerprints on the stolen truck.(132)
No fingerprints were taken from the shirts. (141)

---

* Note pp.3-4 of preliminary hearing before Judge Wyatt, on October 31, 1975:
THE COURT: The result of the lineup, I take it, was the

Over objection, The Government's Exhibit 23, which was a plea of guilty by Schatten to Count One of an indictment in the Eastern District Court of New York, and the judgment of conviction thereon, was received in evidence. This Count charged Schatten with stealing from a pier Unisonic AM-FM stereos being shipped in foreign commerce, on October 22-23, 1970. The Government contended that this conviction was for a crime similar to the crime for which the defendant Schatten was presently on trial, to wit, possession of an interstate shipment of Sarto brand Italian men's knit shirts, stolen from a truck, on July 17, 1974; and that such prior conviction for stealing Unisonic AM-FM stereos in October 22-23, 1970 (about four years previous to the present crime) was relevant and not too remote to prove that the alleged possession of the stolen shirts was with unlawful intent. (142-146)

The Government then rested (146)

The motion to dismiss was denied. (147)

---

failure of the witness to identify the defendant?

MR. COOPER: That is correct. Am I correct, Mr. Jossen?

MR. JOSSEN: Your Honor, actually what happened at the lineup was it consisted of some seven individuals. From those seven individuals the witness said that three people looked familiar to him. One of the three being the defendant.

Thereafter, he was asked to take another look at the lineup and then said that two of the three people looked familiar to him, not including the defendant.

So I believe it is correct to say that there was no positive identification.

Incidently, Goldberger was not interrogated either as to any photographic identification relating to Schatten or as to a lineup identification involving Schatten.

DEFENDANT'S TESTIMONY

(Had Schatten's prior conviction not been received in evidence as part of the Government's case in-chief, Schatten would have elected not to take the witness stand, and the jury would have heard nothing about his prior conviction.)

ARON SCHATTEN was the only witness called by the defense. He testified that he pled guilty in 1972 (after a jury disagreement in his case) and was sentenced for a two year term. (148) Another truckman who said he had labor problems gave him papers to go to the pier to pick up some freight consisting of 600 cartons containing stereo sets and offered him a thousand dollars. It turned out that the freight was stolen. (184-185)

His trial resulted in two other defendants being found guilty but in his case the jury disagreed. The (FBI) agent then took him upstairs and he said, "Look, we have the party we were looking for, why don't you go downstairs and plead guilty, and we will be lenient with you," and all that. And so my attorney at that time asked me if you have to go on trial again, I have to bring him a certain amount of money, and I didn't have it. I assumed that the Judge would be lenient with me. And I pleaded guilty and the judge wasn't lenient. (185-186) He received a sentence of two years. (148)

Schatten has been married for twelve years to Paula Rachler and has two girls, aged 5½ years and 15 months, respectively. (149-150)

He obtained the Goldberger check sometime in July, 1974, in South Fallsburg, New York, specifically at Monticello Raceway, from a fellow named Artie. (150-151)

Schatten's family was then staying for the summer in a rented bungalow up in South Fallsburg. Schatten first met Artie in a nightclub at a charitable show in a hotel in Stevensville. (153) During the week Schatten came to the city to work but would go to the country for weekends. (153-154)

He met Artie after that at other shows and at the racetrack. Artie was a bookmaker and he gave Schatten good information on horses. Later Schatten learned Artie was taking bets at the racetrack from owners. (155)

One night while Artie was giving him a lift to his bungalow, Schatten told him he would have to get rid of his wife's engagement ring for which he had paid $1200 in 1962, as indicated by Defendant's Exhibit A, in evidence. The ring was appraised then at Macy's for insurance purpose. (156-157)

During the month of July his wife was pregnant and her hands were swollen and she couldn't wear the ring so he carried it with him on his key chain or in his pocket. Schatten needed money at the time but he didn't mean to sell the ring to this fellow. However, in the course of a conversation Artie offered to buy the ring for somebody he wants to buy a ring for. Schatten said $2000 would be a fair price. Artie gave him the (Goldberger) check. Several days later, when in the city, Schatten went to Goldberger's store to find out if the check was good and for Goldberger to cash it. Goldberger acknowledged he had issued the check for some stuff he had bought and said it (the check) would be paid when due. Schatten had not previously noticed it was post-dated. (158-160) Goldberger had told him that next week he would have the money and Schatten left his business card from Arpen Trucking. This card was simimlar to Government's Exhibit 9. (161)

Schatten still had not given the ring to Artie. His wife told him that the landlord had asked her for the rent while she was talking to other ladies and she was embarrassed. (162) Schatten then went to a friend of theirs, Mr. Maucatel, to try to cash the check. Maucatel asked, "Is it good?" And Schatten replied, "It will be good on time." Schatten

has no personal checking account. His wife has. He did not want to take this check and put it into his Arpen Trucking account because he then would have to tell his wife he had to sell the ring. (263)

Schatten first met Artie at the Hotel Stevensville charity show around the July 4th weekend. (164) Schatten's party consisted of six persons, some of whom he named; and they sat at a table of twelve which included Artie. (165) After that he would see Artie at the racetrack. Artie was doing fairly well and would give Schatten betting suggestions. Artie was with a different lady every night. Shatten believed Artie lived in an exclusive hotel "because later I found out he could have afforded it very easily." (166) Schatten learned later that Artie was a bookmaker and was taking bets in all the hotels, "I guess numbers and baseball and all that." He learned of this before Artie gave him the check. (167,169) On certain Sundays when it was raining Schatten would make a $25 or $30 bet with Artie.

Schatten straightened out the payment of $443, the balance of the $2443 check. (170)

Schatten lives next to Bedford Stuyvesant which is the second highest in crime at nights. And the neighborhood where he works (has his garage) is"a very bad neighborhood." It was safer to carry the ring around in his pocket because "we had frequent break-ins and it came to the point I didn't report it to the police no more." He was not personally robbed. (173) When he got the check from Artie, Schatten did not give him the ring then. (174) He did not ask Artie where he got the check. After Maucatel told him that the check had cleared, that is when he gave Artie the ring. (175) That was about ten or fifteen days after he got the check, "with the understanding when the check goes through you give me the ring." (175) The $443 was straightened out. (175)

Mr. Maucatel loaned him money on previous occasions, a thousand dollars, $1500. (176) Mr. Maucatel would cash checks for him which he would hold for a few days and then deposit when Schatten had enough funds to cover it. Schatten explained why he believed $2000 would be a fair price. (177-178, 178-179) When Schatten sold the ring he owed the landlord for the bungalow rental for the season.

He had not seen Artie when he went back this summer. Schatten heard he has been thrown out of the racetrack by the security. (180)

Of the money Maucatel gave Schatten for the check, Schatten paid his wife's friend, who is like the Godmother to his little daughter, a thousand dollars he owed her. (183-184)

After Schatten's testimony, the defense rested.(186)

The Government offered no rebuttal.
The motion to dismiss was denied (258)

It is respectfully submitted that on the authority of United States v. Taylor, 464 F.2d 240 (2d Cir. 1972), the Court should not have permitted the case to go to the jury but should have directed judgment of acquittal because Schatten's possession of Goldberger's check for $2443 on July 25, 1974, (considering Goldberger's utter failure to identify Schatten in court as the person who sold him the stolen shirts in July, 1974, plus Goldberger's equivocal testimony that Schatten, rather than the deliverymen, was the person who may have given him Schatten's business card) was hardly sufficient evidence to make out a case beyond a reasonable doubt of criminal possession of the stolen interstate shipment of shirts, so as to permit the jury to pass on the issue of Schatten's guilt or innocence of the crime charged.

Furthermore, the Government completely failed to prove either by direct evidence or by circumstantial evidence that Schatten ever possessed the stolen shirts or even a single shirt, or that he was ever seen in the company of the thief or thieves, or in the company of anyone who had possession of any of the shirts. Since Goldberger did not connect Schatten with the sale of the shirts to him (Goldberger not having identified Schatten in court as the salesman), the least the Government should have been required to do would be to furnish a legally acceptable explanation as to how the check links Schatten beyond a reasonable doubt to such sale. Such explanation was never forthcoming at the trial.

Moreover, the Government unquestionably failed to disprove by hard evidence (rather than by sheer speculation, conjecture and rhetoric in a prejudicially objectionable summation) Schatten's sworn testimony as to how he obtained the check. Since the Government took the position that Schatten's sworn testimony as to how he obtained the check should not be credited, it should have been required as part of its burden of proof in its efforts to overcome the presumption of innocence with which the defendant Schatten was clothed, to affirmatively prove by hard evidence precisely when, where, how, from whom and under what circumstances Schatten obtained possession of the check for $2443 on July 25, 1974, the date when he had his friend Moucatel cash it for him. After all, the check could have passed through any number of hands before it wound up in Artie's hands or in Schatten's hands. What cannot be denied is that in the trial record there is not even a speck of evidence that Schatten met with the deliverymen and received the check from them.

What the Government did to bolster or beef up its anemic or non-existing case was to infuse it with a poisonous type of objectionable evidence. For example:

1. That the stolen truck (which Schatten was not accused of stealing) was found empty on a street about a half mile or so from his garage. (There was no proof that any of the stolen merchandise ever was in this garage.) Schatten described the area as "a very bad neighborhood." (173) Since Schatten was in no way connected with this truck, the admission into evidence against Schatten that such truck was found the indicated distance from his garage is difficult of justification.

2. As proof that Schatten possessed the stolen shirts with knowledge that they were stolen interstate goods, the Government introduced into evidence what it called a similar prior crime which Schatten allegedly committed about four (4) years prior to the present crime.

In the first place the Government completely failed to prove by way of a foundation that Schatten possessed any of the stolen shirts. So, therefore, it is difficult to understand how proof of the commission of the prior crime, even if it were of a similar crime which had been committed, not remotely but contemporaneously with the present crime, could be used to prove knowledgeable possession in the absence of any proof of possession of the shirts on the part of Schatten.

In the second place, under POINT II(A) and (B), pp.18-30, it has been shown that the prior crime was for Larceny, a crime which, as a matter of law and fact, was not similar but dissimilar to the present crime of criminal Possession and, therefore, not relevant or competent on the issue of whether the possession (even if possession had been proved) was with guilty knowledge.

In the third place, even if the prior crime was a crime similar to the present crime and even if possession of the stolen shirts on the part of Schatten had been proved, such prior crime would nevertheless have been incompetent and irrelevant to prove that the possession was with guilty knowledge. The reason for this contention is that the prior crime having been committed on October 22-23, 1970, almost four (4) years prior to the present crime which occurred on July 17, 1974, it would be considered, as a matter of law, as too remote from the present crime rather than "contemporaneous" with the present crime to be considered relevant. This POINT is discussed under POINT III , pages 30-31 of this Brief.

3. In a further effort to bolster or beef up its case, the Government requested and was granted an instruction to the jury:

> "that possession of goods recently stolen if not satisfactorily explained is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew that the goods had been stolen." (248)

Since it was not proved that Schatten was "the person in possession" of any of the stolen shirts, it is respectfully submitted that such instruction was most inappropriate and prejudicial and should never have been given. This POINT is discussed under POINT VII, pp.44-46 of this Brief.

In fact, since the shirts were definitely shown to have been in the physical possession of Goldberger and B.V.Imports to whom Goldberger sold the stolen shirts, the instruction the Court gave against Schatten, who never was shown to have had possession, would appear to be more appropriate and applicable against them had they been on trial for criminal possession or receiving of stolen interstate goods.

It is respectfully submitted that the Government's attempt to bolster or beef up an inadequate case by prejudicially inadmissible and insufficient evidence should not be permitted to succeed and that the conviction should be reversed.

POINT II

(A) SUBSTANTIAL ERROR WAS COMMITTED IN ALLOWING THE DEFENDANT'S PRIOR CONVICTION INTO EVIDENCE, UNDER THE MISTAKEN BELIEF THAT SUCH CONVICTION WAS OF A CRIME "SIMILAR" TO THE PRESENT CRIME AND THEREFORE RELEVANT ON THE CRUCIAL ISSUES OF INTENT AND KNOWLEDGE

At a preliminary hearing held on October 31, 1975 before the Court (Hon. Inzer B.Wyatt, D.J.), in which defense counsel (Mr.Cooper) objected to the use in evidence of defendant's prior criminal conviction (p.7), the Court inquired, "What is the Government's position? Maybe I have anticipated the argument." (p.7)

Mr. Jossen replied (p.8):

> "First, certainly if the defendant testifies the Government intends to use the prior conviction in 1972 under section 659 to impeach the defendant's testimony.
>
> The Government's position is further that the Government should be entitled to prove the underlying circumstances of the conviction as a prior similar act* bearing on the issues of intent and knowledge in this case." (Emphasis supplied)

---

* It will be shown hereafter that the prior conviction was for a **dissimilar** and not for a similar act or crime.

THE COURT: It certainly strikes me that way.

MR. COOPER: Very well, your Honor. I respectfully except to your Honor's ruling.

THE COURT: (pp.8-9) Mr. Cooper, I am looking at McCormick's on Evidence and at page 447 he talks about evidence of bad character and, of course, if the conviction, let's say was for illegal possession of a firearm, let's just say that, I would agree with you. You would be absolutely right, but that conviction would tend to show that the defendant was generally, let' say, a man of bad character, that you would be right. I would rule out.

But then there are the exceptions about proving bad character. For instance, at page 449, McCormick refers to other like crimes by the accused so nearly identical in method as to earmark it as the handiwork of the accused. (Present counsel's note: These because of the same modus operandi are commonly referred to as signature crimes.) (Emphasis supplied)

This is on page 450. To show by similar acts or incidents that the acts on trial were not inadvertent, accidental, unintentional or without guilty knowledge. Also to establish motive. This may serve as evidence of the identity of the doer of the crime or of deliberateness, malice or of a specific intent constituting an element of the crime.

I am inclined to think, therefore, that if he is charged with possession of stolen merchandise knowing that it was stolen, a prior conviction for exactly the same offense* under the principles that I have indicated

---

* The prior conviction of Shatten was not, as the Court incorrectly assumed, "for exactly the same offense," but, as shall be shown, for an entirely different offense, to wit, stealing or larceny of stereos, as Judge Gurfein correctly pointed out in his argument with the Asst.U.S.A. during the motion for bail pending appeal. His two collegues were silent on the point and in fact did not express any opinion on any legal point, but Judge Gurfein was very outspoken in his legal opinions, all of which favored Schatten.

would be admissible whether he takes the stand or not. I may be wrong, but I think that would be my ruling.

At the trial and as part of its case in-chief (142-3), the Government offered in evidence a certified copy of the defendant's prior conviction in the United States District Court for the Eastern District of New York.

THE COURT: (143) All right, Mr. Cooper, this is a question that we discussed before. You object to this. I have heard your arguments as a matter of law and I am going to overrule them and I will permit the government to offer this.

Mr. Clerk, will you mark it in evidence.

The Government then, over Mr. Cooper's objection, offered in evidence a redacted version (Exhibit 23) of part of the indictment in the Eastern District to which the plea was entered. (143-5)

Having erroneously accepted Exhibit 23 in evidence, the Court then instructed the jury as follows (143-146):

I would say, members of the jury, for your information, this is a charge in the Eastern District of New York, which is the federal court which has jurisdiction over, among other things, Long Island and Brooklyn, and it is a charge against the defendant, Mr. Schatten, and others, of what the Government says is an offense similar to the offense for which the defendant, Mr. Schatten, is here on trial, and the paper offered by the Government is a plea of guilty by Mr. Schatten to that charge, and the conviction or judgment of conviction of the Court. * * *

But you will find when I come to give you my instructions that I tell you that one of the essential elements of the offense is the question of intent. Did the defendant, if you find on the facts that he did the acts charged here, did the defendant do those acts knowingly and wilfully, and on the question of intent I am permitting the Government to show arguably, and it is for you the jury, to decide that having committed a similar offense, you can consider this as evidence in considering the intent of the defendant in connection with the case on trial.

Remember I am not passing on the weight of the evidence, but I am only saying that under our rules of admissibility it is permitted for the Government to show this, and to argue to you, that you should consider it in connection with the defendant's intent in the matter here on trial.

All right.

MR. IASON: The Government has no further witnesses, your Honor.

Before resting, may I read this to the jury?

THE COURT: Yes.

(Mr. Iason read from Government's Exhibit 23 in evidence to the jury but the Court Reporter did not record the reading of Exhibit 23.)

MR. IASON: The Government rests.

(Counsel's motion to dismiss the indictment was denied.) (147)

(In the absence of the Court's adverse ruling, Schatten could have and would have exercised his privilege of not testifying, thus avoiding any reference whatever to his prior conviction, because his credibility would not have been placed in issue. On the motion for bail pending appeal, Judge Gurfein pointed this out to Mr. Iason.)

In its charge to the jury, the Court instructed them that they could consider the defendant's previous criminal conviction in weighing his credibility. (251) The Court also charged them (at 251), as it promised it would (at 145-6):

> You may consider in determining whether the defendant acted with guilty knowledge or intent the fact, if you find it to be a fact, that the defendant engaged in another transaction similar to that charged in this indictment.*

* Judge Gurfein, on the motion for bail pending appeal, stated, in substance: "I cannot for the life of me see how the larceny of stereos can be used to prove that the possession of stolen shirts was with knowledge that the shirts were stolen." He accused the Government of improperly using this prior conviction for the crime of larceny to beef up its case of criminal possession.

If the prior conviction was not as a matter of law for a similar crime, then the Court seriously erred in admitting proof of defendant's prior conviction as part of the Government's case in-chief. In addition, it would follow that if such prior conviction was received in evidence under the mistaken belief that it was for a similar crime to the one for which defendant was on trial, it would, indeed, follow that the above instructions given at page 251 as well as the instructions given at pages 145-6, were absolutely wrong and, of course, of sufficient seriousness to warrant the vacatur of the jury's verdict of guilty.

It is respectfully submitted that, as shall be shown, the prior conviction was not for a crime similar to the present crime, but for what, under well established principles, would be denominated or described as the crime of Larceny, whereas the present crime was for what is denominated or described as the crime of Possession Of Stolen Goods Knowing Them To Have Been Stolen From Interstate Commerce. a wholly dissimilar crime from the crime of Larceny, so that the admission into evidence of the prior conviction as part of the Government's case in-chief was seriously erroneous.

Furthermore, the prior crime having been committed on October 22-23, 1970, whereas the present crime was committed on July 17-22, 1974, even if both crimes were similar, the prior crime would be inadmissible because of remoteness. Richardson on Evidence (Prince 10th Edition, section 177, pp. 146-147). This contention will be further discussed under POINT III, pp. 30-31 of this Brief.

POINT II

B) AS A MATTER OF LAW AND FACT THE PRIOR CRIME WAS NOT SIMILAR TO THE PRESENT CRIME

Title 18 U.S.C., Section 659 reads as follows:

> (1st paragraph) Whoever embezzles, steals, or unlawfully takes, carries away, or conceals * * * with intent to convert to his own use any goods or chattels moving as or which are part of or which constitute an interstate or foreign shipment of freight or express; or
>
> (2nd paragraph) Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen * * *. (Emphasis suppled)

The fact that these two independent paragraphs are both found in the same statute, to wit, Title 18 U.S.C., section 659, does not make them similar crimes as the Government erroneously contends. The 1st paragraph charges the crime of larceny of interstate or foreign commerce, whereas the 2nd paragraph charges the crime of possession or receiving of interstate or foreign commerce. The 1st paragraph might just as well have appeared under one section of law whereas the 2nd paragraph might just as well have appeared under a different section of law. Surely, the Government could not then raise the specious argument that the two crimes are similar because they appear in the same section of law, to wit, Title 18 U.S.C., section 659.

Count One of the prior indictment (71 Cr. 584) to which the defendant Schatten pleaded guilty, reads as follows:

> The Grand Jury Charges:
>
> Count One
>
> On or about the 22nd day of October and the 23rd day of October, 1970, within the Eastern District of New York, the defendants Isak Fried, Zali Fried, Simon Brack and Aaron Schatten embezzled, stole and fraudulently obtained with intent to convert to their own use, a quantity of Unisonic AM-FM stereos, having a value in excess of One Hundred Dollars ($100.00) from

> the 21st Street Pier, Brooklyn, New York, which goods were moving as a part of and constituting a foreign shipment of freight from Yokohama, Japan to New York, New York. (Title 18 United States Code, Section 659; Title 18 United States Code, Section 2.) (Emphasis supplied)

The indictment in the present case under which Schatten was convicted, reads as follows:

> The Grand Jury Charges:
>
> From on or about the 17th day of July, 1974 up to and including the 22nd day of July, 1974, in the Southern District of New York and elsewhere, Aron Schatten, the defendant, unlawfully, wilfully and knowingly did have in his possession* certain goods and chattels of a value greater than $100.00, to wit, thirty-five cartons of Sarto brand Italian men's knit shirts, knowing the same to have been embezzled, stolen and unlawfully taken and carried away from a motor truck and vehicle owned by Associated Transport Company, Inc., 11 West Street, Brooklyn, New York, while said goods and chattels were moving as, were a part of, and constituted an interstate shipment of freight, express and property from New York to Cleveland, Ohio. (Title 18 United States Code, Section 659) (Emphasis supplied)

In United States v. Fields, 466 F.2d 119 (2 Cir.1972), the Court, in reversing the defendant's judgment of conviction, pointed out that (at p.120):

> Where a defendant is charged with unlawfully receiving and possessing the trailer, which contained the stolen goods, actual knowledge that the goods were stolen property had to be proved by the Government beyond a reasonable doubt.

In that case the trial court erroneously read from the first paragraph of section 659. This paragraph, the court

---

* Obviously, a person, other than a thief, cannot be in unlawful possession of stolen goods without having received them physically or constructively, nor can he have received them without being in physical or constructive possession. The terms "receives" and "possession" as used in section 659 are really synonymous and

pointed out, deals with the unlawful taking of goods but defendants were not charged with that crime. They were charged under the second paragraph of section 659 with the unlawful receiving and possessing of stolen property, which is a different crime than that charged under the first paragraph.

Likewise, in the present case, under Count One of the prior indictment, Schatten was charged under the first paragraph of section 659 with having stolen a quantity of Unisonic AM-FM stereos. Simply stated, he was accused of being a thief who, because he stole a quantity of Unisonic AM-FM stereos, had thereby committed the crime of Larceny. * *

On the other hand, under the present indictment (75 Cr. 739), Schatten was not accused under the first paragraph of section 659 of taking or stealing stolen property. On the contrary, he was charged under the second paragraph of section 659 with the unlawful possession of stolen shirts. Simply stated, unlike the prior indictment which charged the crime of Larceny, under the present indictment he was being charged with the crime of unlawful Possession of stolen property. As the court in the Fields case held, these are different or dissimilar crimes so they definitely and as a matter of law are not similar crimes as the Government has been persistently contending. It is for that very reason that a defendant cannct be convicted both as a thief of the crime of larceny and as a non-thief of the

---

interchangeable and charge the same crime, and certainly not the crime of larceny which is covered in the first paragraph of section 659.

* * Judge Gurfein accepted this argument. His two collegues made no comment on any of the legal points discussed by dissenting Judge Gurfein.

crime of criminally receiving. People v. Moro, 23 N.Y.2d 496, at 500, 297 N.Y.S.2d 578, citing People v. Daghita, 301 N.Y. 223,228.

Ballantine's Law Dictionary (Third Edition,1969) defines "similar" as follows:

> Having a resemblance in many respects to, nearly corresponding with, is somewhat alike, or has a general likeness to some other thing. Japan Importing Co. v. United States, 24 Cust. & Pat. App. 167, 86 F.2d 124; Fletcher v. Interstate Chemical Co. 94 NJL 332, 110 A.709, 17 ALR 92, affd. 95 NJL 543, 112 A 887. Something less than being an exact duplicate of something else. 13 Am.J. 2d Bldg. Contr. section 10. Sometimes, depending upon the context in which it appears, meaning identical or exactly alike. Anno: 17 ALR 94.

Black's Dictionary (Second Edition) defines "similar" as follows:

> This word is often used to denote a partial resemblance only, but it is also used to denote sameness in all essential particulars. Thus a statutory provision in relation to "previous conviction of a similar offense" may mean conviction of an offense identical in kind. Com. v. Fontain, 127 Mass. 454.

As in the Fountain case, cited in Black's Dictionary, it is respectfully submitted that for the prior crime to have correctly been considered similar to the present crime with which Schatten was charged, in order to have been held relevant on the issue of intent or knowledge, it should have been of a crime defined in the second paragraph of section 659 and not of a crime defined in the first paragraph of section 659. In other words, had such previous offense been violative of the second paragraph rather than of the first paragraph of section 659, then the previous offense would have been of "an offense identical in kind" with which Schatten was presently charged and therefore similar. But such was not the case.

Bouvier's Law Dictionary (Baldwin's Edition) defines "similar" as follows:

> Similar denotes partial resemblance and also sameness in all essential particulars; 127 Mass.454. Similar offence may mean an offence identical in kind.

17 ALR Ann. at page 94 defines "similar" as follows:

> The word "similar" has been interpreted to mean that one thing has a general resemblance in many respects, nearly corresponds, is something like, or has a general likeness, to some other thing (citing authorities).

Ballantine's Law Dictionary defines "Larceny" as follows:

> Stealing or theft. People v. Campbell, 89 Cal.App. 846, 265 P. 364. At common law:- the felony of taking by trespass and carrying away the goods or things personal of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use or the use of some person other than the owner. 32 Am.J. 1st Larc. Section 2. As a statutory offense: the taking of personal property accompanied by fraud or stealth, with intent to deprive another thereof. State v. Ugland, 48 N.D. 841, 187 N.W. 237; the felonious stealing, taking and carrying, leading, riding, or driving away the personal property of another. People v. Lardner, 300 Ill. 264, 133 N.E. 375, 19 ALR 721.

Ballantines's Law Dictionary defines "Receiving stolen property as follows:

> A criminal offense in receiving stolen goods, knowing them to have been stolen in some jurisdictions a substantive crime, indictable and punishable as an offense separate and distinct from the larceny itself. (Emphasis supplied)

That is exactly the distinction the Court points out in the Fields case, supra, pp. 24-25 of this Brief.

Present counsel read every reported case cited by the Government in its Memorandum of Law which it submitted to the trial court and in which it contended that Schatten's prior conviction should be held admissible in its case in-chief on the theory that such conviction was of a similar act. Not a single one of the cited cases held that a conviction under the first paragraph of section 659 which deals with stealing or larceny was for a crime similar to a conviction under the second paragraph of section 659 which deals with the crime of unlawfully receiving or possession of stolen property.

Counsel has also read McCormick's on Evidence, Wigmore on Evidence, Wharton's Criminal Evidence, Weinstein's Evidence, Richardson's on Evidence and other textbooks as well as pertinent Law Review articles. Not a single one of these noted authors cited a single case or made any statement to the effect that a prior conviction for larceny was relevant to prove intent or knowledge in an unlawful receiving or possession of stolen goods case. Likewise, counsel made a diligent search of the cases of the Supreme Court and of the cases of this and of the other circuits and of the various states but failed to find a single case that held that a prior conviction of a thief for larceny was relevant to prove intent or knowledge in an unlawful receiving or possession of stolen goods case. The reason that counsel, despite his diligent law research, could not find a single pertinent case should be obvious--the two crimes are obviously dissimilar and are unquestionably so understood by the various courts throughout the country

Incidently, from the factual standpoint there are differences rather than similarities between Schatten's prior conviction and the present case. For instance:

1. In the prior conviction, the goods were stolen from a pier in Brooklyn, allegedly by Schatten.

2. In the present case, a truck containing merchandise was stolen from a street in Manhattan not by Schattan but by an unknown thief or thieves.

3. In the prior conviction Unisonic AM-FM stereos were allegedly stolen by Schattan.

4. In the present case he is not accused of being the thief but of being the receiver or possessor of stolen shirts, which is merchandise entirely different from stereos

5. In the prior case the stolen stereos constituted a foreign shipment from Yokohama, Japan.

6. In the present case the stolen shirts constituted an interstate shipment.

7. In the prior case Schatten was accused of obtaining the stolen stereos directly as a thief.

8. In the present case, since he is being accused of being in effect a receiver, he only could have obtained the stolen merchandise from a thief, or the thief's emissary, of from some other receiver.

9. Receivers of stolen merchandise are usually a differenct type of people from thieves. The former are usually businessmen while the latter are just plain run-of-the-mill criminals.

The modus operandi between the theft of the stereos from the pier on October 22, 1970 was different from the modus operandi of the unknown thief or thieves who stole the truck which contained the shirts which it is claimed ultimately wound up in Schatten's alleged possession. A comparison of the pattern between the two crimes, as above indicated. fails completely to reveal any common features or characteristics between such two crimes. Furthermore, what the Government claimed was that the crime involving the theft of the stereos was similar to the crime with which the defendant Schatten was presently charged, to wit, criminal possession of stolen goods.

It is respectfully submitted that for the trial court to have considered these two crimes similar instead of completely dissimilar was to distort the English language to the serious prejudice of Schatten and to unwarrantedly and inexcusably benefit the Government's weak case.

POINT III

EVEN IF THE PRIOR CRIME WERE SIMILAR TO THE PRESENT CRIME, IT NEVERTHELESS SHOULD HAVE BEEN HELD INADMISSIBLE BECAUSE IT WAS TOO REMOTE FROM THE PRESENT CRIME TO BE RELEVANT

The prior crime was committed on October 22-23, 1970, whereas the present crime was committed between July 17-22, 1974, almost 4 years later, thereby making the prior crime too remote to be relevant on the issue of guilty knowledge.

Richardson on Evidence (Prince 10th Edition) states the law on the subject as follows:

> Section 177 (pp.146-147) Time Element in Use of Other Crimes to Show Intent.
>
> Statements may be found in the cases to the effect that evidence of other similar acts is admissible to show guilty knowledge on the occasion in question if these other acts were made "at or about the same time by the same person charged." People v. Katz, 209 N.Y. 311,327; 103 N.E. 305,310. See also Boyd v. Boyd, 164 N.Y.234,241, 58 N.E. 118,120, where the court expressing the same idea in different language said similar "contemporaneous" acts are admissible. Since the problem of admissibility of similar acts to prove guilty knowledge is essentially one of relevancy, an arbitrary time limitation would seem to have no reasonable justification. The sounder approach

> is set forth in People v. Shulman, 80 N.Y. 373, note, at 376, where the court said: "It is obviously impossible to lay down any general rule limiting the time within which such transactions must have taken place, in order to render proof of them competent. It is generally said in the cases that they must have occurred about the same time as the commission of the alleged crime, but that is quite indefinite, and in some of the reported cases proof of them has been received, although they have occurred months before and after the time of the crime. Each case, as to the application of this rule, must depend largely upon its own circumstances. ..."

It is respectfully submitted that even if the prior crime had been of a crime similar to the present crime, since it occurred about four years previously to the present crime, it may not, as a matter of law, be held to have occurred "contemporaneously" with the present crime, nor can it be held to have occurred "at or about the same time" as the commission of the alleged present crime.

The prior crime should therefore have been held to be irrelevant, because of remoteness, on the issue of intent or knowledge.

POINT IV

A) **EVEN IF** THE PRIOR CONVICTION WERE TECHNICALLY ADMISSIBLE FOR THE LIMITED PURPOSE OF KNOWLEDGE, THE SUMMATION OF THE GOVERNMENT PROSECUTOR WAS SO GROSSLY IMPROPER AND DELIBERATELY DECEPTIVE BOTH FACTUALLY AND LEGALLY AS TO COMPLETELY VITIATE THE EFFECT OF THE COURT'S CAUTIONARY INSTRUCTIONS; FURTHERMORE, THE SUMMATION WAS AIMED AT CONVINCING THE JURY THAT SCHATTEN HAD A PROPENSITY FOR STEALING AND SELLING RADIOS ALTHOUGH THE PRESENT CHARGE WAS SOLELY FOR CRIMINAL POSSESSION OF SHIRTS

Over objection, during the trial, the court allowed the prosecutor to elicit that the stolen truck contained radios and merchandise (23-24). Then later the court ruled (25-26):

> All right they (Receipts) will be admitted, but the jury will understand that there is no charge here that involves these other shipments. The only shipment that is involved here is the 35 cartons consigned to Stein Stores in Cleveland.

Then, over objection, the witness Katz was permitted to testify that he had shipped on the stolen truck three cartons of radios, that is, thirty-six radios, worth about $400.00. (30-32) During the trial and in summation, the prosecutor consistently tried to mislead the jury into the erroneous belief that Unisonic AM-FM stereos which were involved in the prior conviction were radios per se, the same as the radios which were on the stolen truck. Actually a Unisonic stereo is not a radio per se but a combination of a phonograph, amplifiers and also a radio, but definitely not a radio alone.

In its supplemental request to charge, the Government indicated that the Court should charge about the use of a similar act for identification purposes or for common scheme or design, etc., but the court stated, "It is too late for me to consider any further instructions on that now." (197)

It would seem that the court indicated by this ruling that the prosecutor was not to claim in summation that

the prior crime of 1970 could be used for identification purposes, that is, as proof that Schatten is the person who committed the present crime of criminal possession; nor that the prior crime was to be used as proof of a criminal common plan, commencing in 1970 and continuing until 1974, the date of the present crime.

Because Mr. Katz testified he had shipped radios (30-32), the prosecutor argued (210):

> "Now, isn't it likely that someone who had a source who would fence or buy stolen radios in 1970 * might be able to get to that same source or might think he could in 1970? Doesn't it sound like some kind of common scheme to you? (The prosecutor was improperly arguing that Schatten was involved in a common scheme which commenced in 1970 to sell stolen radios in 1974, a crime with which he was not presently charged. To reiterate, the crime and the only crime with which he was presently charged was criminal possession of stolen shirts, as the court had instructed the jury at pp. 25-26. In addition, he was disregarding the ruling of the court that it would "not consider any further instructions on that now." (197) It would appear that the prosecutor's argument was in clear violation of that ruling. That being so, should not the court have reproached the prosecutor for violating its instructions and properly instructed the jury right then and there?)

The prosecutor continued (210):

> Wouldn't it be possible for someone just to watch a delivery man like Greenspun going into places that sell electronic equipment, seeing it come out in boxes marked radios, stereos, whatever and follow him and steal his truck."(Clearly, the prosecutor was equating radios and stereos as if there were no difference at all between them. Furthermore, there was no proof presented to the jury that Greenspun, picked up any boxes that had the word "radio" stamped or printed or written on them. According to Katz what he was shipping were cartons (not boxes) of radios.) "Then unload the goods, as we have here. Doesn't this sound a lot like that prior conviction from 1972? Then there is the aspect of where the truck was located. Just four or five blocks from the Arpen Trucking Company Terminal." The prosecutor continued along this vein.(210-211)

---

* At p. 209, the prosecutor argued: "Here is Mr. Schatten who testified that he had been convicted in 1972 for selling radios that were part of a stolen freight." Schatten gave no such testimony (185-6). The prosecutor was guilty of a flagrant misstatement of Schatten's testimony. He very well knew that the plea was to stealing stereos.
(See p.33A,Appendix)

So, although Schatten is charged with criminal possession of stolen shirts and not with stealing radios, the prosecutor, in effect, was accusing him of being a thief who was out to steal the radios contained in the truck, just as he had stolen the radios in 1970. Furthermore, the prosecutor without interruption or corrective admonition from the court, was being permitted by the court to violate the cautionary instructions it gave at pp. 25-26, in response to the defense objection:

> All right they (Receipts) will be admitted, but the jury will understand that there is no charge here that involves these other shipments. The only shipment that is involved here is the 35 cartons (of shirts) consigned to Stein Stores in Cleveland.

It is respectfully submitted that it was the duty of the court, in order to effectively protect the defendant's constitutional due process right to a fair trial, to immediately have disallowed the prosecutor's unfair argument and to severly admonish him as well as to give corrective instructions to the jury at that point. Most unfortunately and regrettably, the court remained silent.

Then at p.233, the prosecutor argued:

> Also a factor that you may consider is what his intent was here, and whether he had these goods he would have known they were stolen or a common scheme to sell radios once again or to steal and sell radios once again as Mr. Schatten had been convicted of selling radios a fairly short time earlier.

As is clearly apparent, this single quoted paragraph contained a number of prejudicial legal distortions as well factual distortions and deliberate untruths as the prosecutor, apparently, intent on obtaining a conviction regardless of the means he was pursuing, well knew.

In the first place, the defendant was not being charged with being involved in a common scheme to sell radios once again; and he had not been previously convicted for selling radios. The previous conviction was for stealing stereos which he had allegedly stolen on October 22-23, 1970, and for which he pleaded guilty in 1972, which is hardly "a short time earlier." (The date of the prosecutor's summation was Nov.1975.) Also any argument involving any kind of a common scheme between the time of the alleged theft in 1970 or the time of his conviction in 1972 and the present charge in 1974 was not based on any evidence whatever. Moreover, there certainly was no evidence to warrant the impermissible argument that there was any period of time during which Schatten engaged in a common scheme both "to steal and sell radios once again as Mr. Schatten had been convicted of selling radios a fairly short time earlier." To repeat, the previous conviction was solely for stealing stereos and not for both stealing and selling radios, as the prosecutor well knew.

It is respectfully submitted that such clearly inaccurate, distorted and deliberate misstatements of the facts and the law, as well as the brazen violation of the Court's cautionary instructions (at pp.25-26) that the only shipment that is involved is the 35 cartons of shirts,, must and should be considered so seriously unethical as to warrant the Court's intervention, under its supervisory powers, by depriving the Government of the fruits of the prosecutor's highly improper conduct by vacatur of the verdict of guilty.

Then the prosecutor continued to imply that Schatten was the thief (although he was not indicted for being the thief) who was interested in the radios in the stolen truck, whereupon defense counsel objected that there was "nothing in the indictment about the theft of radios in 1974." The court overruled the objection, stating, contrary to its instructions given at pp.25-26, and quoted at p.2 of this Brief, that the only shipment that is involved is the 35 cartons of shirts, "I will permit that. Go ahead." (235) This ruling may very well have been

understood by the jury as rescinding the court's previously given cautionary instructions given at pp.25-26; and, even worse, the ruling may have improperly influenced the jury into accepting the prosecutor's grossly improper arguments.

With this ruling in his favor (at 235), the prosecutor again clearly implied that Schatten was the thief who was primarily trying to steal the radios but didn't mind picking up the $2443 extra dollars for the shirts. (234-235. Since the prosecutor claimed that Schatten was the one who had picked up the check from the unknown deliverymen (235-236), it followed that he was calling Schatten the thief who left the stolen truck "too close to his own terminal." (235)

It follows that if the prior conviction for stealing stereos was not of a conviction for a crime similar to unlawful possession of stolen shirts, or was of a crime too remote from the present crime to be relevant on the issue of knowledge or intent, then the prosecutor's summation necessarily added to the extreme prejudice engendered by the improper admission in evidence of the prior conviction on the issue of knowledge or intent.

On the other hand, even if the prior conviction for stealing stereos be deemed to be a conviction for a crime similar to the present crime of criminal possession of stolen shirts, then it is respectfully submitted, the verdict should be vacated because of the prejudicially unfair summation of the prosecutor, which clearly improperly stressed that the defendant's prior criminal conviction is relevant on the issue of guilt, i.e., "that the (defendant) is by propensity a probable perpetrator of the crime" for which he is being tried. (Michaelson v. United States, 335 U.S. 465,475, 69 S.Ct. 213,216, 93 L.Ed.168, 1948; See also POINT IV(B)pp.37-40for further gross improprieties in the Government prosecutor's summation.)

POINT IV

B) UNDER THE CIRCUMSTANCES OF THIS CASE, IT WAS IMPROPER FOR THE PROSECUTOR IN HIS SUMMATION TO COMMENT ON THE DEFENDANT'S FAILURE TO CALL WITNESSES

In his summation, in referring to Artie, the bookmaker, who Schatten swore had given him the Goldberger check in payment of Schatten's wife's ring, the prosecutor made the following positive statement of fact: (207-208)

"There was no Artie."

That statement was impermissibly prejudicial because the prosecutor was improperly making himself an unsworn witness for the Government on a very vital issue in the case, to wit, whether Artie was a real person, as Schatten testified, or whether Artie was a fictititious character invented by Schatten, as the prosecutor contended.

Then the prosecutor continued: (208)

"If there had been don't you think Mr. Schatten would have him here as a witness and have him testify as Mr. Moucatel explained how he got the check?"

Under the circumstances of this case, the prosecutor's comment on the defendant's failure to call Artie as a witness, whom he improperly affirmatively stated as a fact was a non-existent character, was prejudicially improper because, among other reasons: (1) Since Schatten had testified that Artie was a bookmaker (155,167), it would follow that Artie would be incriminating himself to testify to his illegal occupation. (2) Even if Schatten wanted to call him as a defense witness, Schatten did not know Artie's present whereabouts. He testified that he had not seen Artie when he went back this summer (1975) and had heard that Artie had been thrown out of the race track by the security. (180) (3) If Schatten's testimony was true

that he had indeed gotten the Goldberger check from Artie in payment for his wife's ring, it would follow that it was quite possible that Artie, the bookmaker, knew that such check was in payment for stolen goods when he received it. In any event, he could very well be incriminating himself were he to admit that he did in fact possess and give this check to Schatten, an unwitting dupe, in payment for Schatten's wife's ring.

Then the prosecutor made the following very unfair statement, in summation: (208)

> "Why didn't Mr. Schatten call his wife here to testify about the sale of the ring. She would have been able to tell you about the ring if he had called his own wife, but she wasn't here."

Mrs. Schatten could not testify to the sale of the ring for the very simple reason that she had not witnessed such sale. Schatten in his testimony had made it very clear that he did not want his wife to know that he had sold the ring. (163). He gave adverse business reasons for not informing her of the sale of the ring, to wit: (163)

> "I didn't want her to know I had to sell it and let her know that things were getting to the point where I had to sell the ring."

With clear knowledge of such testimony, the prosecutor was without any ethical justification for commenting on the fact that Schatten had failed to call his wife to testify "about the sale of the ring."

Furthermore, the defendant Schatten was presumed innocent and was under no affirmative burden or duty to prove his innocence by producing witnesses. The Government, on the other hand, had the affirmative burden and duty to prove Schatten's guilt without calling upon the jury to draw any

impermissible presumption or inference against Schatten for omitting to call Artie or Mrs. Schatten as witnesses, under the circumstances disclosed by this trial record.

In People v. Cwikla, 45 A.D.2d 584, 360 N.Y.S.2d (1st Dept. 1974), in reversing the conviction, the court stated (at 34):

> "Of course, the prosecutor's comments on the failure to call the parents as witnesses were improper. (citing cases) and since such remarks were directed to the crucial issue presented by the defense, they cannot be disregarded as harmless." (Emphasis supplied)

Likewise, in the present case, the prosecutor's remarks were directed at the crucial issue presented by the defense, to wit, that Schatten had honestly obtained the Goldberger check in a legitimate transaction with Artie. If Schatten's testimony were believed, he was entitled to an acquittal. It is respectfully submitted that for the prosecutor to improperly stress Schatten's failure or omission to call possible corroborating witnesses was plain error which cannot and should not be disregarded as harmless in this extremely weak case against the defendant.

In People v. Conklin, 39 A.D.2d 160, 332 N.Y.S.2d 826 (3rd Dept. 1972), the court stated (at 828):

> "The law is well settled that a district attorney ordinarily does not have the right to comment on the failure of the defendant to take the stand or omitting to call witnesses. It is readily applicable to the present case where the issue is one of credibility and where remarks relating to the failure of the defendant to call witnesses are improper and prejudicial because there is no rule of law, under the

> circumstances, to justify such statements by the prosecutor. In the present circumstances it cannot be established that the summation did not prejudice the jury." (citing cases) (Emphasis supplied)

Likewise, in the present case, the prosecutor's comments were directed to the crucial issue of Schatten's credibility and his omission to call so-called possible corroborating witnesses.

In People v. Figueroa (2nd Dept. 1971), 38 A.D.2d 595, 328 N.Y.S.2d 514,515, the court stated:

> "Further in his summation the Assistant District Attorney remarked about the failure of defendant to call certain members of his family as witnesses, thus inferring that had they been called their testimony might have been damaging to the defendant. Aside from the fact that there is no evidence to show that these persons had any knowledge of what transpired, there is no duty upon a defendant to call witnesses." (Emphasis supplied)

The court, in reversing the conviction, indicated that it considered the remark highly improper and that it denied the defendant a fair trial.

Since, as pointed out, Schatten had testified that he did not tell his wife about the sale because he did not want her to know that business was so adverse that he had to sell her engagement ring (163), it was particularly prejudicial and legally and ethically inexcusable for the prosecutor to have commented on Schatten's omission to call his wife as a witness "to testify about the sale of the ring."

It is resepctfully submitted that the Government prosecutor failed to carry out the positive obligation on his part to see to it that Schatten's trial was fairly conducted (Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314; and, since Schatten's conviction was obtained unfairly, it should not be permitted to stand.

POINT V

THE COURT"S CHARGE THAT DEFENDANT'S PREVIOUS CONVICTION IS A FACTOR FOR THE JURY TO CONSIDER IN DETERMINING HIS CREDIBILITY WAS ONE-SIDED AND INADEQUATE

In charging the jury relative to their consideration of the defendant's previous conviction on the issue of his credibility (251), the court should, in fairness to the defendant, have included as a balancing factor what the defendant claimed were the underlying facts as well as his reason for pleading guilty in that case, all of which was elicited by the prosecutor on cross-examination of the defendant.(185-6).

Schatten explained that the two co-defendants in that case were convicted but that the jury disagreed in his case. Then he had to bring a certain amount of money for his lawyer for a retrial and that he did not have it; and,in addition,he expected leniency from the judge if he pleaded guilty, but he did not receive the expected leniency. (185-6) All this testimony which the prosecutor elicited without any contradiction indicated that the defendant, although innocent in that case took what is denominated as an "ALFORD" plea. The court should in fairness to the defendant have reminded the jury of this testimony and also of his testimony (184-6) how he was innocently inveigled into this crime,and instructed them that they had the right to consider it in evaluating the weight they would give to Schatten's prior conviction on the important issue of his credibility as a witness.

It is respectfully submitted that because the court omitted to include this testimony and explain its permissible use by the jury in evaluating the weight to be given to Schatten's prior conviction on the important issue of his credibility as a witness, its instructions as given was wholly one-sided in favor of the Government and prejudicial to the defendant who was the only defense witness, and thus constituted plain error.

POINT VI

THE ADMISSION IN EVIDENCE OF THE TESTIMONY BY GOLDBERGER OF HIS HEARSAY CONVERSATION WITH THE TWO UNIDENTIFIED DELIVERYMEN CONSTITUTED REVERSIBLE ERROR

Goldberger testified that two white men arrived in a Ryder rental truck with the shirts. No connection between Schatten and these two unidentified men or with the Ryder rental truck was proved or even attempted to be proved by the Government prosecutor. The fact that the check for $2443 subsequently wound up in Schatten's possession does not necessarily prove that these men were in any way whatever connected with Schatten. The only testimony as to how, when, where, from whom and the circumstances under which Schatten obtained the check came from Schatten. Such testimony was not disproved or contradicted by the Government by any evidence whatever. The check could have passed through several hands until it wound up in the hands of Artie, the bookmaker. Who but a thief would be likely to be his customer and give him the check in payment or part payment of betting losses? After the check cleared, Artie could then give such party any balance due him.

The check having turned out to be the payment by Goldberger for stolen merchandise, one would hardly expect Artie to come forward as a willing witness for Schatten, the fall guy. Furthermore, the defendant, it should be kept in mind, is presumed to be innocent and is under no obligation whatever to produce any witnesses, as the Government improperly implied. (See POINT IV(B), pp.37-40 of this Brief)

For the prosecutor to make himself an unsworn witness and affirmatively state that Artie, under the circumstances of this case, is a fictitious character (207-208) is to completely disregard Schatten's sworn uncontradicted testimony that Artie is a living person and merely to accept unsupported prosecutorial argument or rhetoric to the contrary.

Furthermore, Goldberger testified he never saw the shirt salesman before the sale or after the sale of the shirts. Moreover, andmost significantly, he did not identify Schatten in court as the salesman. In addition, Schatten was not indicted for Conspiracy with these two unidentified deliverymen, nor was Schatten ever seen together with them or either of them. Under all these circumstances, it is respectfully submitted that reversible error was committed by the Court when, over ~~objection~~, it ruled that Goldberger could testify to a purely hearsay conversation he had with these two unknown men. (61)

In this alleged objectionable hearsay conversation, Goldberger testified that they gave him a business card on which appeared the names Arpen Trucking Company, Incorporated and Aron Schatten. Goldberger admitted that he did not contact Schatten on the phone, claiming he called only once but did not contact him. (73-74). (See p.12 of this Brief in which Schatten explains that he gave the business card to Goldberger and further explains the circumstances under which he gave him this card; see also pp. 5-8 of this Brief in which Goldberger admits that he may have gotten this card from a person who came to him to find out if the check was good and if he would cash it.)

It is beyond argument that the Government failed completely to prove when, where, how, or under what circumstances the deliverymen obtained the shirts or that they gave to the defendant Schatten and to no one else the check for $2443 which Goldberger testified in his hearsay testimony that he gave them;

nor did the Government affirmatively disprove Schatten's testimony relative to the circumstances whereby it was he who gave Goldberger his business card. (See p. 12 of this Brief.)

It is respectfully submitted that no foundation was laid for the admission in evidence of this injurious hearsay conversation between Goldberger and the deliverymen; and that substantial error was committed by the court when it overruled counsel's objection to this injurious inadmissible hearsay conversation. (61)

POINT VII

REVERSIBLE ERROR WAS COMMITTED WHEN THE COURT CHARGED RELATIVE TO POSSESSION OF GOODS RECENTLY STOLEN

The court charged the jury:(at p.248)

> "that possession of goods recently stolen, if not satisfactorily explained is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew that the goods had been stolen."

In People v. Foley, 307 N.Y. 490, 492-3, 121 N.E.2d 516, the court, in affirming the reversal of defendants' convictions of burglary, third degree, and larceny, second degree, predicated upon their alleged recent, conscious and exclusive possession of the fruits of those crimes, held that such alleged possession may be established by direct evidence as well as upon circumstantial evidence, and made the following observations: (492-3)

> However, as is evident from the case cited, the circumstances must be established by clear and convincing evidence and must be of such a character as, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession by the defendant. While the testimony adduced presents many facts that are consistent with and point to recent and exclusive possession by defendants of the stolen articles, there is no one fact or series of facts which points inevitably thereto and it cannot be said that the evidence excludes to a moral certainty every other reasonable hypothesis but that defendants had conscious, recent and exclusive possession of the stolen property. Therefore, a new trial must be had. (Emphasis supplied)

In the present case there certainly is no direct evidence that Schatten ever was in possession of the stolen shirts. Nor can the Government successfully claim that it has established such possession by sufficient circumstantial evidence.

In Schatten's case, as in the Foley case, "there is no fact or series of facts which points inevitably thereto and it cannot be said that the evidence excludes to a moral certainty every other reasonable hypothesis but that the defendant (Schatten) had conscious, recent and exclusive possession of the stolen property."

Since there was no direct evidence of possession of the stolen shirts on the part of Schatten, and likewise, since there certainly was inadequate circumstantial evidence as to any possession of the stolen shirts on the part of Schatten, within the strict rule laid down in the Foley case, it follows that there was nothing for Schatten to explain and that the instruction by the court as to the inference to be drawn from possession of goods recently stolen was therefore uncalled for and most inappropriate and it was prejudicial error to have given it.

In fact, since the shirts were definitely shown to have been in the actual physical possession of Goldberger and B.V. Imports to whom Goldberger sold the stolen shirts, at a profit, the instruction the court gave against Schatten, who was never shown to have had possession, would appear to be more appropriate and applicable against them had they been on trial for ciminal possession or receiving of stolen interstate goods.

In United States v. Baum, 482 F.2d 1325 (2d Cir.1973), the Court, in reversing, made it clear that conviction for possession of goods from interstate shipment requires evidence of dominion and control of the property that was the subject of the theft, citing United States v. Kearne (reversed), 444 F.2d 62,64 (2d Cir.1971); United States v. Casalonuova, 350 F.2d 207,209 (2d Cir.1965).

It is respectfully submitted that since such "required evidence of dominion and control" on the part of Schatten of the stolen shirts was lacking, it follows that the court's instructions relative to the inference which a jury may reasonably draw and find from possession of goods recently stolen, if not satisfactorily explained, was inapplicable to Schatten and completely uncalled for and constituted plain error requiring a reversal of the judgment of conviction.

POINT VIII

It is respectfully submitted that prejudicial error was committed as a result of the court's failure in any way to marshall the evidence or to give necessary cautionary instructions, particularly because of the Government prosecutor's grossly improper summation which was violative of the defendant's due process right to a fair trial. *

CONCLUSION

The judgment of conviction should be reversed, the jury's verdict of guilty vacated, and the indictment dismissed because the defendant Schatten's guilt of the crime charged was not proved against him by competent evidence beyond a reasonable doubt; or, in the alternative, a new trial should be granted him.

Respectfully submitted,

Alfred I. Rosner

Alfred I. Rosner
Attorney for appellant
Aron Schatten
Off. & P.O.Address
277 Broadway, New York,N.Y.10007
962-3342

Martin B. Rosner

Martin B. Rosner
Of counsel, on Brief

---

* Court's complete charge to jury appears at pp.12A-32A of Appendix